

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 09-T-0049 - Application of Upstate NY Power Corp. for a Certificate of Environmental Compatibility and Public Need for a 50.6 mile 230kV Transmission Facility From Galloo Island in the Town of Hounsfield, Jefferson County, to the Fitzpatrick-Edic Substation in the Town of Mexico, Oswego County.

STAFF'S REPLY AND CROSS MOTION TO DISMISS

ASHLEY MORENO
Assistant Counsel
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 473-8123

Dated: Albany, New York
July 17, 2012

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 09-T-0049 - Application of Upstate NY Power Corp. for a Certificate of Environmental Compatibility and Public Need for a 50.6 mile 230kV Transmission Facility From Galloo Island in the Town of Hounsfield, Jefferson County, to the Fitzpatrick-Edic Substation in the Town of Mexico, Oswego County.

STAFF'S REPLY AND CROSS-MOTION TO DISMISS

INTRODUCTION

This reply and cross-motion is respectfully submitted on behalf of Staff of the Department of Public Service (Staff) designated to represent the public interest in this proceeding. It is submitted in opposition to the motion of Upstate NY Power Corp. to adjourn the proceeding for six to nine months, and requests that this proceeding be dismissed without prejudice. Staff requests that the proceeding be dismissed because the continued pendency of this proceeding is an undue burden on landowners and the Applicant has not provided any additional substantive information or a schedule for reconvening the proceeding.

BACKGROUND

Upstate NY Power Corp. (the Applicant) submitted an application pursuant to Public Service Law (PSL) §122 on January 13, 2009 proposing to construct a 50.6 mile electric transmission facility from Galloo Island in the Town of Hounsfield, Jefferson County to the Fitzpatrick-Edic Substation in the Town of Mexico, Oswego County. After submitting supplemental filings, the application was determined to comply with the PSL and implementing regulations as of August 20, 2009.

A pre-hearing conference was held before Administrative Law Judges (ALJs) Casutto and Stockholm on November 16, 2009 and public statement hearings were held on

November 16 and 17, 2009. ALJ Casutto set the schedule by his ruling dated December 17, 2009. The first milestone in the schedule, cross examination of the Applicant, was slated to commence April 8, 2010.

By letter dated February 17, 2010, the Applicant submitted a motion requesting that the schedule be suspended so that it could develop additional detailed analysis of certain alternative routes in response to public comments it received. The Applicant's motion included several alternative routes it planned to review in further detail and also included a proposed Community Involvement and Outreach Plan. Staff responded to the Applicant's motion on February 26, 2010 opposing the motion to the degree that the proposal did not provide for adequate community involvement and public outreach. By letter dated March 2, 2010, Roberta French, representative for citizen intervenor Margaret Gavin, provided comments in reply to the motion and cross-motion. ALJ Casutto issued a "Ruling Canceling Schedule" on March 31, 2010 that canceled the hearing schedule and set a procedural conference for September 15, 2010.

The Applicant and Staff jointly filed a "Stipulation on Schedule for Suspension Period" on June 22, 2010. The stipulation described the actions the Applicant would take to fully inform the public and parties of the reasons for the suspension period and included outreach provisions the Applicant would undertake including: publication of notice, updating and maintaining its website, providing notice of scheduled public meetings, providing parties with a schedule for submission of an alternatives analysis and supplement to the application, and notifying landowners and municipalities when a supplement was filed. A letter from the Applicant accompanying the stipulation also updated parties on its alternatives analysis describing a two-tiered system for evaluating alternate route locations. At

the time of the filing of the letter and stipulation the Applicant indicated its Tier 1 alternatives analysis was nearing completion.

Thereafter, the Applicant has engaged in a series of delay tactics deliberately intended to keep the application on hold while the Applicant seeks a market for its product. Applicant submitted another letter July 16, 2010, stating it was still working to complete the Tier 1 analysis and describing other outreach efforts it would perform, and requesting a postponement of the September 15, 2010 status conference. The "Ruling on Revised Schedule" dated July 22, 2010, canceled the September 15 procedural conference and scheduled a telephone conference among the parties on October 13, 2010 for the Applicant to provide a status report on its alternatives analysis and outreach efforts. It also noted Applicant's intent to circulate a Tier 2 alternatives map to the parties by that date.

The parties participated in a telephone conference on October 13, 2010. The Applicant provided a summary of the call by its letter dated October 21, 2010 and provided a map indicating an alternative sub-aquatic route as well as three land-based routes. During the conference, the Applicant requested that review of the Article VII application be held in abeyance with regard to land-based routes to allow the Applicant to explore the feasibility of a sub-aquatic route between Galloo Island and the Town of New Haven. By the "Ruling on Revised Schedule", the Applicant's request was granted and a subsequent telephone conference was scheduled to provide an interim status report of the sub-aquatic route evaluation. A further status conference was scheduled for April 14, 2011 by which time the Applicant anticipated having confirmation regarding award of a power purchase agreement by the New York Power Authority (NYPA)

and other information regarding the feasibility of a sub-aquatic route.

The Applicant provided an interim status report on the sub-aquatic route evaluation on January 26, 2011 by telephone conference. ALJ Casutto provided a summary of the telephone conference by memorandum dated February 8, 2011. The Applicant provided little additional information on its evaluation and described its efforts to obtain a power purchase agreement. Landowners suggested alternate above-ground routes.

The parties participated in another status conference call on April 14, 2011 and the Applicant provided a memorandum summarizing the call by letter dated April 18, 2011. The Applicant noted no change regarding the status of the power purchase agreement and noted it was completing a "desktop" evaluation of the sub-aquatic route. Several landowners posed questions regarding the above-ground route and reported concerns regarding the uncertainty of the transmission line location. The Applicant noted that a subsequent telephone conference was scheduled for August 4, 2011.

By letter dated April 20, 2011, the "Ellisburg landowners" submitted a letter providing an additional summary of the April 14, 2011 status conference stating that the Applicant indicated it had completed a "desktop" evaluation including evaluation of bathymetry, electrical and construction issues and that the information identified no obstacles that would disqualify the sub-aquatic route alternative. The letter stated that the Ellisburg landowners requested that the desktop studies be made available to the parties, but that the Applicant declined to do so. The Ellisburg landowners also noted that the Applicant indicated its commitment to investigate the feasibility of the sub-aquatic route, but that no further investigation would be pursued in the absence of a power

purchase agreement. The Ellisburg landowners further stated that they support a full and objective evaluation of the sub-aquatic route alternative and that such study should not be dependent on the presence of a power purchase agreement.

By letter dated April 25, 2011, the Applicant responded to the Ellisburg landowner's letter and stated that such letter attempted to prematurely draw final conclusions as to the ultimate feasibility and economic prudence of the sub-aquatic route. The Applicant clarified that although desktop studies were performed on the sub-aquatic route, other studies would need to be performed before a definitive conclusion could be reached. It explained that a sub-aquatic route would be significantly more expensive than an over-land route and that, unless it was awarded a power purchase agreement, it would pursue an over-land transmission line.

On July 27, 2011, the Applicant submitted a letter and attached an editorial article from the *Democrat and Chronicle*. The letter described that, as described in the article, a NYPA staff report regarding its wind farm program was due in September. The Applicant suggested the status conference be rescheduled for October 26, 2011 to review the anticipated staff report from NYPA.

The "Ruling on Revised Schedule" dated July 28, 2011 canceled the telephone conference and rescheduled a status report telephone conference in October, 2011. The Ellisburg landowners submitted a letter July 29, 2011 offering some observations on the Applicant's July 27 letter. They noted that the purpose of the status report was to report on evaluation of the sub-aquatic route rather than NYPA's review of and determination to grant a power purchase agreement and that the next status report should focus on the progress of the sub-aquatic route evaluation.

A telephone conference was held on October 27, 2011 and the Applicant provided a summary of the call by letter dated October 31, 2011. The Applicant reported that NYPA had denied the Applicant's request for a power purchase agreement and terminated the Great Lakes Offshore Wind initiative. The Applicant also reported that it was pursuing other possibilities for a power purchase agreement. The "Ruling on Schedule" issued November 2, 2011 describes that the Applicant requested until the second quarter of 2012 to explore other possible power purchase agreement options and that it expected to have a definitive answer as to whether it can propose an all underwater route, or whether it will have to pursue an overhead route, at that time. During the call, a question was raised regarding which land based route would be proposed if the Applicant did not pursue the underwater cable. The Applicant noted that the original proposed route would be pursued and that it may consider modifications proposed by the public although full investigation had not yet been performed on those options. The ruling set a telephone conference for July 6, 2012 to receive the status report. The ruling also required an interim status report be submitted on or before April 5, 2012.

By letter dated April 4, 2012, the Applicant reported that there are no reasonable prospects for a power purchase agreement or other revenue source to allow the Project to proceed with the sub-aquatic route. The Applicant noted that there may be an opportunity for the Applicant to secure an interconnection point at the Coffeen Street Station routing the transmission line through the Town of Hounsfield. The Applicant noted that such prospect would depend on cooperation of third parties in the queue for interconnection. It also reported pursuing a Request for Proposal for a power purchase agreement from the Department of Defense.

By letter dated April 30, 2012, counsel for the Applicant, Young/Sommer LLC, withdrew as counsel of record for the Applicant.

On July 3, 2012, in advance of the status conference to be held on July 6, 2012, the Applicant submitted an email letter providing an update to the circumstances impacting its project development and requesting an adjournment of six to nine months for a further status report. By letter dated July 5, 2012, Staff responded to Applicant's letter and requested the July 6, 2012 conference call be held.

A telephone conference was held on July 6, 2012. During the conference, the Applicant reported no new information with regards to any further study or evaluation of any route. Several landowners expressed their frustration with the proceeding inquiring as to how much longer the case would be allowed to remain open. Those landowners also explained that they had not and would not continue to develop or improve their properties while this proceeding was ongoing. For example, Ms. French and Ms. Gavin reported that they had planned expansion of their blueberry farm, but would not expand until they understood if their property would be impacted by the project. Parties discussed the possibility of an adjournment of the proceeding and Staff inquired as to whether the Applicant has considered withdrawing its application without prejudice until it was ready to proceed noting that the application materials, if the route were to remain as proposed, would require updating. The Applicant noted it would not consider withdrawing its application.

By email letter dated July 6, 2012, ALJ Casutto summarized the phone conference and set a schedule for responses to the Applicant's motion for a further adjournment of six to nine months.

ARGUMENT

POINT I

THE APPLICANT HAS NOT PROVIDED ANY ADDITIONAL
SUBSTANTIVE INFORMATION OR PROVIDED A
SCHEDULE FOR RECONVENING THE PROCEEDING

As described above, when the Applicant initially requested suspension of the schedule on February 17, 2010, it stated that the purpose of the suspension was to give it time to develop additional detailed analyses of certain alternative routes in response to comments received from members of the public. While the Applicant continues to raise new possible routes and opportunities for a power purchase agreement, it has failed to complete any alternative route analyses or provide any new substantive information or a schedule for reconvening the proceeding despite its commitment to do so in the "Stipulation on Schedule for Suspension Period" (Stipulation) it filed jointly with Staff on June 22, 2010.

As described in the stipulation, the Applicant committed, among other things, to update and maintain its website and provide parties with a schedule for submission of an alternatives analysis and a supplement to the application. The Applicant has not fulfilled its commitment. Staff notes that no website exists at the address provided by the Applicant¹; it is not accessible and has not been maintained to provide the public with information regarding the status of its application. Likewise, the Applicant has failed to provide any kind of schedule for completion or submission of an alternatives analysis or a supplement to the application.

In fact, the Applicant does not appear to be studying the various alternate routes for its project or making any other effort to supplement the existing record with any useful

¹ www.upstatenypower.com

information. Rather, the Applicant has repeatedly requested additional adjournments of this proceeding to allow it to monitor external market conditions, unrelated to routing or other issues raised by the parties in this proceeding. Most recently, by its July 3, 2012 letter, it describes low electrical power prices and the uncertainty of an extension to the Production Tax Credit; the Applicant indicates it is monitoring these conditions to determine whether it will commit further investment to the pursuit of this project. The Applicant has not provided any indication when or indeed if it will pursue certification of this project.

The period of suspension and abeyance has not led to the supplementation or clarification of the record in this proceeding in any way. The time granted to the Applicant for additional study has not yielded any additional information for parties to review and has not resulted in a concrete proposal for parties to consider. In particular, the Applicant has not followed through on the analysis of alternative routes in response to public comments it received. Instead, it has revealed the Applicant's uncertainty as to the financial viability of the project given current external market factors. Staff respectfully requests that the proceeding be dismissed without prejudice to the Applicant and that if and when the Applicant determines the project is viable, that it submit an application at that time.

POINT II

THE PROCEEDING SHOULD BE DISMISSED IN THE INTEREST OF FAIRNESS TO LANDOWNERS

At this time, the proceeding has been pending for over three and a half years since the initial application documents were submitted on January 13, 2009. The proceeding has been

suspended or in abeyance since March 31, 2010, almost two and a half years. The suspension and abeyance period now represents the predominant status of the proceeding. In its July 3, 2012 email letter, the Applicant suggests that there is "no legitimate reason not to wait to see" how certain external factors may impact its proposed project. The reason is quite clear, while the Applicant requests permission to time the market in order to maximize the project's profitability, landowners are being asked to put their lives and investments on hold.

Landowners whose properties are crossed by the proposed project have been active during the three and a half years this proceeding has been pending and have participated in the numerous telephone conferences. On several telephone conferences, individual landowners have addressed questions to the Applicant regarding the status of its investigations and studies and, other than vague replies uttered during the calls the Applicant has made no effort to respond. Nevertheless, these landowners have taken the time out of their schedules to participate in the proceeding and have repeatedly described their concerns regarding how the proposed project may impact their properties.

During the July 6, 2012 telephone conference, several landowners expressed their frustration and dissatisfaction with the inactivity and continued pendency of this proceeding. Those landowners raised issues of fairness stating that while the proceeding is on-going they would not develop their properties, including expansion of farming operations, without having some certainty about the project's impact on their properties. While the Applicant stated that conditions impacting its decision to develop its project were uncertain, so too are the conditions impacting landowners' decision to develop their properties.

The Applicant has been given a great deal of time to further investigate and study its options and it has not yet acted. It is an undue burden on landowners to ask them to wait indefinitely for the Applicant to determine what is in its best financial interest and at the same time ask them to put their interests on hold. The landowners have been diligently participating over the pendency of this proceeding to ensure that their interests are adequately represented; they should be permitted to move on with their lives and development of their properties without being asked to wait an additional six to nine months while the Applicant sees how things pan out for its project. In the interest of fairness to these landowners, Staff respectfully request that the motion of the Applicant for an additional adjournment of this proceeding be denied and that this proceeding be dismissed without prejudice to the Applicant and that if and when the Applicant determines the project is viable, that it submit an application at that time.

CONCLUSION

For the reasons described above, Staff requests that the Applicant's motion be denied and that this proceeding be dismissed without prejudice.

Respectfully submitted,

/s/

ASHLEY MORENO
Assistant Counsel